Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

OCTOBER TERM, 1999

VIPIN TRIVEDI,

Petitioner,

vs.

EDWARD THAYER and JOHN OLDHAM, M.D.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee, classified as mentally impaired and therefore unable to perform his job, is deprived of a constitutionally-protected property interest when a State agency fails to provide him a due process hearing which State law requires it to convene within 30 days?

2. Whether due process requires a public employer to convene a hearing only when the employee is deprived of the essential economic interest in his employment?

LIST OF PARTIES

In addition to the parties named in the caption, Thomas Cooper and Leonard Rubin, M.D., were parties before the district court. Dr. Rubin was a party before the Court of Appeals.

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No. ____

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VIPIN TRIVEDI,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Vipin Trivedi, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is unreported and is reproduced in the Appendix at App. 1. The district court issued a written opinion which is reported at 1998 WL 799181 (S.D.N.Y. November 16, 1998). The district court's opinion is reproduced in the Appendix at App. 7.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 24, 1999. Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the date of entry. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states, in part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATUTORY PROVISION INVOLVED

N.Y. Civil Service Law § 72 is reprinted at App. 45.

STATEMENT OF THE CASE

1. *Overview*

Petitioner, Vipin Trivedi, commenced employment with the New York State Psychiatric Institute (the "Institute") in the early 1980's as a Research Scientist. In February 1997, pursuant to 42 U.S.C. § 1983, he sued respondents, Edward Thayer and John Oldham, M.D., asserting they violated the Due Process Clause in connection with the Institute's effort to classify him as mentally unfit to work. Trivedi asserted that respondents' failure to schedule and convene a mental fitness hearing violated procedural due process.

2. *Statement of facts*[1]

On December 4, 1995, Thayer advised Trivedi that, pursuant to § 72 of the New York Civil Service Law ("§ 72"),[2] the Institute would place him on involuntary leave effective December 20, 1995. (JA-100). Thayer cited a medical evaluation alleging that Trivedi was unable to perform his duties and he needed medical treatment. *Id.*

On December 11, 1995, Trivedi's attorney made prompt and timely demand for a statutorily-required impartial hearing and demanded, as the law permitted, any test results concerning Trivedi prepared by any expert. (JA-102; JA-326). Although § 72 required the State to convene a hearing within 30 days to resolve Trivedi's mental fitness for duty, the parties agree that respondents never scheduled one.

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[1] Since the district court granted summary judgment, we present the facts in the light most favorable to petitioner. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986).

[2] This statute is re-printed in its entirety at App. 45.

Deeming himself constructively discharged, Trivedi did not return to work, citing respondents' bad faith in stigmatizing him and proposing a biased hearing officer who previously worked for the agency and had testified in a prior proceeding that Trivedi was mentally unfit.

Trivedi provided the names of two impartial arbitrators and summarized their qualifications (JA-107-08). Respondents did not follow up on these suggestions or identify an independent arbitrator despite provisions in § 72 authorizing that procedure if the parties could not agree on the hearing officer.

Respondents also proceeded in bad faith in light of the racial harassment to which one defendant, Thomas Cooper, had subjected Trivedi during the previous six years. In a prior suit against Cooper, a jury sustained Trivedi's racial harassment claim and awarded him $700,000 in damages, which the district court remitted to $50,000. *See*, *Trivedi v. Cooper*, 1996 WL 724743 (S.D.N.Y. Dec. 17, 1996). Cooper played a material role in the § 72 determination as he requested the initial mental health evaluations and provided respondents false information that predicated the adverse charges. (JA-313-13, 317-20, 340-43, 345).

Respondents provided no contemporaneous reason for not timely convening the hearing. They did not contemporaneously deem Trivedi absent without leave, or state that any such perceived status would obviate the need for a hearing. Indeed, in a December 4, 1995 letter, Thayer did not claim that Trivedi had abandoned his job. (JA-100). If anything, Thayer's determination to produce relevant materials and his stated desire to schedule a hearing reflected his contemporaneous belief that Trivedi still worked for the agency and had full due process rights that a § 72 hearing could vindicate.

The Institute also allowed Trivedi to exhaust his sick leave (JA-100) and, three months after deeming Trivedi mentally unfit, Thayer testified he was still classified under § 72. (JA-313). By letters dated November 5 and November 19, 1996, citing § 72, the Institute's Senior Personnel Director reminded Trivedi that he was on leave and opined that this benefit would soon terminate. (JA-115-16). These letters contemplated that respondents still employed Trivedi, not that he had abandoned his job. *See*, JA-115 ("If you do not return to work prior to the expiration of your leave, your employment can be terminated as a matter of law").

However, on November 5, 1996, the Institute advised Trivedi that, by dint of his continuous absence for nearly one year, his employment could be terminated if he did not return to work before December 20, 1996. (JA-115). A subsequent letter indicated that Trivedi's § 72 leave and his employment would end on December 20, 1996. (JA-116). Since Trivedi did not return to work as directed, he was terminated.

3. *Prior proceedings*

Asserting that respondents violated his constitutional right to procedural due process, Trivedi filed suit in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. §§ 1983 and 1988.

At the close of discovery, respondents moved for summary judgment, asserting that "good faith" qualified immunity attached because Trivedi never returned to work after they placed him on involuntary leave. (JA-68). Respondents asserted they were not required to schedule a hearing because of "the unusual circumstances in this case — plaintiff placing himself on voluntary leave." (JA-69 ¶ 75).

While respondents did not seek summary judgment on the merits, the district court (Hon. Denise L. Cote) did address the underlying claims. Specifically, Judge Cote held that, although Trivedi had a property interest in continued employment, Thayer and Dr. Oldham did not deprive him "of the essential economic interest at stake in his continued employment" since he ignored the Institute's orders to return to work and Thayer allowed him to draw against his sick leave credits and continued to issue him paychecks." (App. 18).

Since the district court issued a final judgment adversely resolving Trivedi's Federal claims, pursuant to 28 U.S.C. § 1291, he appealed to the United States Court of Appeals for the Second Circuit.

In an unpublished decision, the Second Circuit affirmed summary judgment, concluding merely that "the district court's November 16, 1998 opinion and order contained sufficient grounds to support the grant of defendants' motion for summary judgment." (App. 3).

REASONS FOR GRANTING THE WRIT

This case strikes at the heart of the Due Process Clause. As this Court stated in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950), "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *See also*, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("[t]he fundamental requisite of due process of law is the opportunity to be heard").

Contrary to the well-settled rule that the State cannot deny a property interest without "some kind of hearing," *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 19 (1978), respondents concededly failed to afford petitioner a State-mandated hearing after determining he was mentally-unfit to work, asserting that Trivedi's failure to come to work justified a "wait and see" approach.

In rejecting Trivedi's due process challenge, the district court agreed that Trivedi enjoyed a property interest in continued employment. However, in concluding that respondents did not deprive Trivedi of the "essential economical interest" in his employment, Judge Cote ignored Supreme Court and inter-circuit authority holding that the State cannot deny *any* non-trivial property interest without a hearing. Since the Second Circuit's summary affirmance likewise departed from these settled principles, certiorari is warranted.

POINT I

THE COURTS BELOW IGNORED THE WELL-ESTABLISHED PRINCIPLE THAT THE DUE PROCESS CLAUSE COMPELS THE STATE TO CONVENE A HEARING WHEN STATE LAW EXPRESSLY REQUIRES ONE

In granting summary judgment, the district court held that respondents did not violate the Due Process Clause even though his property interest ripened and they failed to schedule a State-mandated hearing to resolve his mental fitness to work. In affirming summary judgment, the Second Circuit ignored settled inter-circuit and Supreme Court authority that State laws incorporating mandatory language create Constitutionally-protected property interests which the government cannot deprive without due process. Certiorari is warranted.

Section 72 directs employers to comply with specified procedures once they decide an employee is mentally unfit to work. (App. 45-47). Once it invokes this section, an employer lacks discretion and must follow its terms or explicitly drop any claim that the employee suffers from mental illness.

More specifically, the employer must give the employee written notice of the charges and a hearing to contest the agency's adverse determination. Under § 72, if an employee requests a hearing to challenge a public employer's determination, "the appointing authority *will* afford the employee a hearing within thirty days of the date of [the employee's] request." (App. 46) (Emphasis supplied).

Under settled procedural due process principles, the statutory commands in § 72 require employers to timely convene a due process hearing once they decide the employee is mentally unfit to work. *See*, *Hewitt v. Helms*,

459 U.S. 460, 472 (1983) ("the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); *Mallette v. Arlington County Employees' Supplemental Retirement System*, 91 F.3d 630, 635 (4th Cir. 1996) ("our focus must center on the degree of discretion afforded to the Retirement System's decisionmakers. The Arlington Code narrows the substantive range of the Board's decisionmaking to the application of certain criteria. Once an employee meets those particularized standards, the Code does not allow administrators the discretion not to award benefits, or to apply additional or alternate eligibility criteria. Arlington's ordinance speaks to its officials in compulsory terms: qualifying members "shall receive" benefits. That mandatory language creates a "legitimate claim of entitlement" in employees who meet the System's standards") (citing, *inter alia*, *Daniels v. Woodbury County*, 742 F.2d 1128, 1132 (8th Cir. 1984) and *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979)).

Relatedly, as this Court held in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-41 (1985), when a State-conferred benefit creates a property right, any State-created procedures for the revocation of that interest must satisfy Constitutional standards. *See also*, *Logan v Zimmerman Brush Co.*, 455 U.S. 422, 432-32 (1982).

Accordingly, although the district court properly held that, under the Civil Service Law, Trivedi enjoyed a Constitutionally-protected property interest in continued employment, (App. 17), respondents' utter failure to provide due process violated the Constitution. Since the Second Circuit's summary affirmance of Judge Cote's contrary conclusion ignored well-settled due process principles that this Court and other circuits have re-affirmed time and time again, certiorari is warranted.

POINT II

IN HOLDING THAT RESPONDENTS DID NOT DENY TRIVEDI THE ESSENTIAL ECONOMIC INTEREST IN HIS POSITION, THE COURTS BELOW IGNORED SUPREME COURT AUTHORITY AND DEPARTED FROM INTER-CIRCUIT HOLDINGS

Judge Cote held, and the Second Circuit affirmed, that respondent derived Trivedi of no property interest since he failed to return to work and the Institute kept him on full pay status. (App. 18). Citing no legal authority for this proposition, Judge Cote concluded that "the defendants did not deprive Trivedi of the essential economic interest at stake in his continued employment." (App. 18). Since this conclusion flatly contradicts Supreme Court authority and departs from inter-circuit holdings, certiorari is warranted.

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court counseled that, in determining what process is due, courts should consider "the private interest that will be affected by the official action." Accordingly, this Court has held that due process protects any non-trivial deprivation. *See*, *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 1813 (1997) ("while our opinions have recognized the severity of depriving someone of the means of his livelihood, they have also emphasized that in determining what process is due, account must be taken of 'the *length*' and 'finality of the deprivation'") (citations omitted) (emphasis in original); *Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972) (notice and hearing are necessary prior to deprivation of property interest that "cannot be characterized as *de minimus*"); *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (10-day suspension from school triggered procedural due process because it was not *de minimus*).

Respondents's invocation of § 72 was significant, not trivial. Failing to convene a hearing, Thayer and Dr. Oldham burdened and stigmatized Trivedi's continued employment through a mental unfitness finding. The adverse effect of this serious determination cannot be denied — Trivedi reasonably deemed the § 72 process as a continuation of the discrimination and retaliation fully litigated in his favor in the first suit. Indeed, in proceeding against Trivedi, respondents followed the direction of a supervisor, Cooper, who was found to have discriminated against petitioner for six years. *Trivedi v. Cooper*, 1996 WL 724743 (S.D.N.Y. Dec. 17, 1996).

Contrary to Judge Cote's formulation, the question is not simply whether the public employee lost salary; rather, as the Seventh Circuit has noted, "[o]nly interests substantial enough to warrant the protection of federal law and federal courts are Fourteenth Amendment property interests. Whether an interest is that substantial depends on the security with which it is held under state law and its importance to the holder." *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983) (citing *White v. Thomas*, 660 F.2d 680, 684 (5th Cir. 1981)). The test articulated by Judge Posner in *Brown* reflects that lost salary is not the only criterion in resolving whether a public employee was denied due process. As *Brown* noted, a job loss may implicate the Due Process Clause if State law affords the plaintiff an interest in his position. *Id.* at 364.

Indeed, inter-circuit authority holds that even a suspension from employment can trigger due process protections. *See*, *Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991) ("Bergna contends that it was not clearly established in 1982 that a temporary suspension, as opposed to a discharge, could implicate the procedural protections of the due process clause. Bergna is incorrect") (citing, *inter alia*, *Goss v. Lopez*, 419 U.S. 565 (1975)); *Garraghty v. Jordan*, 830 F.2d 1295, 1299 (4th Cir. 1987) ("Garraghty's temporary suspension, though lasting only five days, was not a *de minimus* deprivation, for with that suspension he lost

compensation and other emoluments of the office for the period of the suspension"); *Wynegar v. Des Moines Independent School District*, 20 F.3d 895, 899 n.5 (8th Cir. 1994) (while the length and severity of a suspension is not determinative of whether a property right exists, "they are factors to weigh in determining the appropriate form of hearing"); *Boals v. Gray*, 775 F.2d 686, 697 (6th Cir. 1985) (Wellford, J., concurring).

Trivedi's § 72 classification equaled a suspension since, under the statute, an adverse determination as to his mental fitness to work can result in an involuntary leave of absence. By invoking § 72, Thayer and Dr. Oldham triggered due process requirements that they failed to satisfy. In affirming summary judgment, the Second Circuit departed from Supreme Court and inter-circuit authority holding that suspensions from work and other non-trivial deprivations are sufficiently serious to warrant due process protection. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: September 14, 1999
Goshen, New York

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of June one thousand nine hundred and ninety-nine.

PRESENT: Joseph M. McLaughlin,
José A. Cabranes,
Circuit Judges,
Robert L. Carter,*
District Judge.

JUN 24 1999

VIPIN TRIVEDI,

Plaintiff-Appellant,

–v.–

No. 98-9636

EDWARD THAYER, THOMAS COOPER, LEONARD RUBIN, M.D., AND JOHN OLDHAM, M.D.,

Defendants-Appellees.

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

APPEARING FOR APPELLANT: STEPHEN BERGSTEIN, Law Offices of Michael H. Sussman, Goshen, NY (Michael H. Sussman, *of counsel)*.

APPEARING FOR APPELLEES: THOMAS B. LITSKY, Assistant Attorney General for the State of New York (Eliot Spitzer, Attorney General; John W. McConnell, Deputy Solicitor General; Michael S. Belohlavek, Assistant Attorney General, *of counsel*), for *Defendants-Appellees Thayer, Cooper, and Oldham.*

BRUCE M. BRADY, Callan, Regenstreich, Koster & Brady, New York, NY, *for Defendant-Appellee Rubin.*

Appeal from the United States District Court for the Southern District of New York (Denise Cote, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Vipin Trivedi appeals from the district court's grant of summary judgment, in favor of defendants-appellees Edward Thayer, Thomas Cooper, Leonard Rubin, and John Oldham.

Having carefully considered all of Trivedi's arguments on appeal, and having reviewed the parties' briefs and all other materials submitted to us, we conclude that the district court's November 16, 1998 opinion and order contained sufficient grounds to support the grant of defendants' motion for summary judgment. *See Trivedi v. Thayer*, No. 97 CIV. 1377 (DLC), 1998 WL 799181 (S.D.N.Y. November 16, 1998).

Accordingly, we AFFIRM the judgment of the district court.

For the Court,
Karen Greve Milton, Acting Clerk

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
NOV 18 1998
S.D. OF N.Y.

VIPIN TRIVEDI,

Plaintiff,

– against –

EDWARD THAYER, THOMAS COOPER, LEONARD RUBIN, M.D., and JOHN OLDMAN, M.D.,

Defendants.

97 **CIVIL** 1377 (DLC)

JUDGMENT

Both parties having moved for summary judgment and the matter having been come before the Honorable Denise Cote, United States District Judge, and the Court on November 16, 1998 having rendered its Opinion (81517) and Order denying plaintiff's motion and granting defendants' motions for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's opinion (81517) and Order, dated November 16, 1998, plaintiff's motion is hereby denied and defendants' motions for summary judgment are hereby granted; accordingly, the case is closed.

Dated: New York, New York
November 18, 1998

JAMES M. PARKISON

Clerk of Court

BY:

/s/

Deputy Clerk

MICROFILM

NOV 18 1998 3^{00} PM

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 11-19-98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIPIN TRIVEDI,

Plaintiff,

–v.–

EDWARD THAYER, THOMAS COOPER, LEONARD RUBIN, M.D., AND JOHN OLDHAM, M.D.,

Defendants.

97 CIV. 1377 (DLC)

OPINION AND ORDER

APPEARANCES:

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DENISE COTE, District Judge:

On February 2, 1997, Vipin Trivedi ("Trivedi") filed this complaint alleging that his former employer had violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Specifically, Trivedi alleges that Edward Thayer, the Director of Human Resources at the New York State Psychiatric Institute ("Institute"); Thomas Cooper, a senior research scientist at both the Institute and the Nathan Cline Institute, and plaintiff's former supervisor; Leonard Rubin, a psychiatrist who had examined Trivedi on November 2, 1995; and John Oldham, the Director of the Institute, deprived him of his right to a hearing to determine if he was mentally unfit to perform his job. Trivedi separately alleges that Rubin violated his rights by submitting a false psychiatric evaluation of Trivedi, and that Cooper violated his rights by submitting false material information to Thayer knowing that information would contribute to a misleading diagnosis by Rubin.

This is the second lawsuit brought by Trivedi complaining of unfair treatment while an employee for the New York State Office of Mental Health. Trivedi had sued the Office of Mental Health and Cooper in March 1995 for employment discrimination and retaliation ("Trivedi I"). In October 1996, Trivedi won a verdict against Cooper for Cooper's discriminatory treatment of Trivedi. The trial had examined Trivedi's employment experience through December 1995.

This current lawsuit largely concerns Trivedi's claim that the Institute failed to hold the hearing required by Section 72 of the New York Civil Service Law, N.Y. Civ. Serv. Law § 72 (McKinney 1998) (hereinafter "Section 72"), after notifying Trivedi that he would be placed on an involuntary leave effective December 20, 1995, for Trivedi's alleged "mental unfitness". Trivedi contends that he made repeated requests for a Section 72 hearing and that the defendants' failure either to grant him the hearing or to lift the

involuntary leave deprived Trivedi of salary and benefits and caused him to suffer other damages. The parties have now made cross motions, in the plaintiff's case a partial motion, for summary judgment. For the reasons described below, the plaintiff's motion is denied, and the defendants' motion is granted.

BACKGROUND

The following facts are undisputed. Trivedi had been an employee at the Institute since the early 1980s. On October 17, 1995, Oldham requested that the Department of Civil Service conduct an examination of Trivedi to determine his mental fitness to continue his employment. On October 24, Thayer ordered Trivedi to report to Rubin on November 2 for an evaluation of his fitness for duty under Section 72. The letter advised Trivedi that if he was found medically unfit for duty he would be placed on a leave of absence until he was found able to return to work.

On November 2, following his examination of Trivedi, Rubin recommended that Trivedi be found unfit for duty. According to Rubin,

> Trivedi shows many signs of schizoid, schizotypal and obsessive-compulsive personality disorders but does not meet DMS IV criteria for any of these. The closest acceptable diagnosis would be Delusional disorder, 297.1.

By letter of November 22, Oldham was informed of Rubin's conclusion that Trivedi was unfit to perform his duties.

Consequently, on December 4, Thayer wrote to Trivedi that the medical evaluation had shown that he was unable to perform his duties and was in need of treatment. The letter advised Trivedi that the Institute "intends to place you on involuntary leave of absence" under Section 72, effective December 29, 1995. The letter also advised Trivedi of his

right to appeal and to request a hearing within ten working days of receiving the notice. A copy of Section 72 was enclosed with the letter. The letter explained that while Trivedi was on a Section 72 leave he was entitled "to use available leave credits, sick leave with half pay, or leave without pay for a period of up to one year of continuous absence due to this disability." Trivedi had prior to this time already obtained the Institute's approval for a vacation extending from December 20 to January 12. Trivedi used this time to travel to India and so informed his employer.

Since filing his first lawsuit ("Trivedi I") on March 28, 1995, Trivedi had been represented by attorney Michael Sussman ("Sussman"). Sussman responded to Thayer's December 4 letter on December 11 with a demand for a hearing. He accused the Institute of acting in retaliation for Trivedi's pending lawsuit. On January 17, 1996, Thayer relayed to Sussman the name of the Institute's nominee for a hearing officer and asked for Trivedi's response at his earliest convenience. Thayer noted, "[s]ince Mr. Trivedi has been on vacation during the past month we propose to extend the 30 day time period for the hearing . . . ."

On January 22, 1996, Sussman responded with a critique of Rubin's report, which he had received from Thayer, and a demand that "Trivedi immediately be returned to work with full restoration of any benefits." The letter continued, "[i]f you insist on proceeding, we do not agree to any relaxation of the deadline for this proceeding." Sussman then made two counter suggestions for hearing officers, giving their names and cities of residence (Spring Valley and New York City), but including no other identifying information.

On January 29, 1996, Thayer wrote to Sussman in pertinent part as follows:

> From your statements it seems that you may be misinformed. You demand that we return Mr. Trivedi to work immediately with ". . . full restoration of any benefits . . .". *Mr. Trivedi has not been placed on any*

> *kind of leave from work. In fact, he did not report for duty after his scheduled vacation.* He has not submitted recent time sheets, nor has he stopped at the payroll office to collect the paychecks being kept for him. Furthermore, he has failed to meet with his supervisor . . . as he was directed to do . . . . [H]e is placing himself in danger of insubordination by his apparent refusal to come to work.
>
> You also state that our claim that Mr. Trivedi is unable to work is "wholly specious". Mr. Trivedi has been found unfit to work . . . under Section 72 . . . .
>
> [Y]ou say that you will seek injunctive relief if we do not proceed expeditiously. From what would you . . . seek injunctive relief? Mr. Trivedi has appropriate work to do . . . . Neither his pay nor his benefits have been affected in any way. *[U]ntil his appeal is heard [pursuant to Section 72] he must report for work or receive permission to use his leave credits. If he continues to be absent from work without authorization he may be subject to disciplinary action* . . . .
>
> We are willing to proceed expeditiously. Please send me information on [the] credentials and relevant experience [of your two nominees] at your earliest convenience.

(Emphasis supplied.) Sussman never responded with further information regarding his nominees.

On February 6, Thayer wrote to advise Trivedi that he had been absent from work without authorization since January 16, 1996, that he had until February 20 to submit an explanation, and that employees absent from work without authorization for ten consecutive workdays are deemed to have resigned. Sussman responded on February 12, that Trivedi was not absent from work without authorization because he had been placed on an involuntary leave of absence on December 20, as indicated by Thayer's December 4 letter. Sussman continued,

> . . . [b]y this letter, you are hereby noticed [sic] that Mr. Trivedi is ready, willing and able to work . . . . If you are now taking the position that Mr. Trivedi can return to work, I urge you to notify him and this office in writing of your new found position. Unless Mr. Trivedi and this Office receives [sic] written notification from you to the contrary, based on your December 4, 1996 letter, Mr. Trivedi will continue to assume that he is on an involuntary leave of absence.

There was no written response from the Institute to Sussman's February 12 letter to Thayer.

Over eight months later, on November 5, 1996, the Institute wrote Trivedi to advise him that he had been continuously absent since December 21, 1995, and that if he did not return to work before December 20, 1996, his employment could be terminated. A November 19 letter indicated that Trivedi's Section 72[1] leave and his employment would end on December 20, 1996. Trivedi never returned to work.

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[1] The defendants take the position that the reference to Section 72 in the November 19th letter was in error and should have been instead a reference to Section 73, the portion of the Civil Service Law addressed to voluntary leave. *See* N.Y. Civ. Serv. Law § 73 (McKinney 1998) (hereinafter "Section 73"). The body of the letter spells out the procedure to be followed for the employee to return to work from a Section 72 leave: "You have the right to apply to this office prior to [December 20, 1996] for restoration to duty if you are medically fit to perform the duties of your position . . . ." as well as a description of his Section 73 rights: "After the termination of your employment, you have the right to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work."

DISCUSSION

Summary judgment may not be granted unless the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. The moving party bears the burden of demonstrating the absence of a material factual question, and in making this determination the Court must view all facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, (1986). When the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on the "mere allegations or denials" of his pleadings. Rule 56(e), Fed.R.Civ.P.; *accord Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). In deciding whether to grant summary judgment, therefore, this Court must determine (1) whether a genuine factual dispute exists based on the evidence in the record, and (2) whether the fact in dispute is material based on the substantive law at issue.

The plaintiff's first claim asserts that all four defendants deprived Trivedi of a "liberty" interest without due process of law and in retaliation for his filing of Trivedi I. The second claim makes the same assertion, although in this claim it is alleged that Trivedi was deprived of a "property" interest. The Court understands these claims to be procedural due process claims. The third claim, brought solely against Rubin, alleges that Rubin falsely submitted a psychiatric report which deprived Trivedi of his due process rights. Finally, in the last claim, Trivedi alleges that Cooper violated Trivedi's due process rights by submitting false material information to Thayer for use in the plaintiff's mental health evaluation. Trivedi claims that this false material substantially contributed to a "false and materially

misleading diagnosis" by Rubin. The Court understands these last two claims to be substantive due process claims.

MOTION BY DEFENDANTS COOPER, THAYER AND OLDHAM

Thayer and Oldham have moved to dismiss the claims against them on the ground that they are protected by the doctrine of qualified immunity. Cooper, as well as Thayer and Oldham, argue that the doctrines of res judicata and collateral estoppel bar the assertion of any claim that could have been raised in connection with Trivedi I. Finally, Cooper contends that the claims against him must be dismissed since he was not personally involved in the claims presented through this lawsuit.

A. Qualified Immunity

Trivedi argues that Section 72 gave him a right to a timely hearing once he challenged, through Sussman's December 11, 1995 letter, the finding that we was mentally unfit to work. Specifically, Trivedi asserts that Section 72 entitled him to a hearing by January 10, 1996, and that the Institute's failure ever to schedule a hearing is proof that it wilfully violated his right to a hearing. The failure to hold the hearing by January 10, according to Trivedi, deprived him of his right to procedural due process.

A description of Section 72 and its procedural requirements is necessary to understand the framework in which the parties contest these issues. Once a medical officer certifies that an employee is mentally unfit to perform his duties, Section 72 requires the employer to "notify such employee that he or she *may* be placed on leave of absence." Section 72(1) (emphasis supplied). After receiving notice of the reasons for the proposed leave and of his rights under Section 72, an employee is given ten days to object and to

request a hearing. If an employee requests a hearing, Section 72 provides that

> the appointing authority shall supply to the employee . . . copies of all diagnoses . . . *and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made* by the appointing authority as provided in this section. The appointing authority will afford the employee *a hearing within thirty days of the date of a request* by the employee to be held by an independent hearing officer agreed to by the appointing authority and employee . . . . If the parties are unable to agree upon a hearing officer, he or she shall be selected by lot from a list of persons maintained by the state department of civil service . . . . The appointing authority will render a final determination within ten working days of the date of receipt of the hearing officer's report and recommendation . . . . In any event, *a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review.* An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his or her credit.

Id. (emphasis supplied).

The remaining subparagraphs of Section 72 address the right of an employee placed on leave to apply within one year for an examination to determine that he has become fit to work, *see* Section 72.2; an employee's right to appeal to the civil service commission any determination that he is unfit, *see* Section 72.3; the employer's right to terminate an employee not reinstated within one year of being placed on leave, *see* Section 72.4; and the employer's right to place an employee on involuntary leave immediately if she determines

that there is probable cause to believe that the employee represents a potential danger to others, *see* Section 72.5.

Thus, under the terms of Section 72, Sussman's December 11 request for a hearing triggered the requirement that a hearing be held within 30 days, that is by January 10, 1996, and that a final determination be made within 75 days, that is by February 26, 1996.[2] Pending the final determination, imposition of the involuntary leave of absence was "held in abeyance," and the employee was required to report for work.

Oldham and Thayer argue that they are protected by the doctrine of qualified immunity. Before addressing their claim of qualified immunity, I must assess whether there has been any violation of the plaintiff's rights.

> The better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.

County of Sacramento v. Lewis, 118 S.Ct. 1708, 1714 n. 5, (1998); *see Medeiros v. O'Connel*, 150 F.3d 164, 169 (2d Cir. 1998) ("The Supreme Court's unambiguous preference is that we consider the merits first . . . ."). A procedural due process claim requires the plaintiff to show that the state action infringed upon a property or liberty interest protected by due process and that the process received by plaintiff was inadequate. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 & n. 3 (1988).

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[2] The seventy-fifth day was Saturday, February 24.

1. Property Interest

To trigger the protection of the Due Process Clause, Trivedi must show that he possessed a property interest recognized by the Constitution. *See* U.S. Const. amend. XIV, § 1; *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 625, 629 (2d Cir. 1996). The existence of this property interest is a question of state law:

> "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

Id. (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

Trivedi does not identify the property right at issue here that was protected by the Constitution, but appears to contend that he had a property interest in the Section 72 hearing. If this is Trivedi's contention, he has confused the procedural mechanism for enforcing a right with the underlying substantive property interest. *Furlong v. Shalala*, No. 97-6220, 1998 WL 652328, at *12 (2d Cir. Sept.23, 1998); *see also Loudermill*, 470 U.S. at 541. The only recognized property interest that this Court is able to discern for Trivedi is his right to continued employment. Although not specifically argued by Trivedi, as a state employee protected by the provisions of the New York State Civil Service law, his continued employment likely rises to the level of a protected constitutional interest. *See Todaro v. Norat*, 112 F.3d 598, 600 (2d Cir. 1997); *Donato*, 96 F.3d at 629. The rationale for giving continued employment constitutional protection is "the severity of depriving someone of his or her livelihood." *FDIC v. Mallen*, 486 U.S. 230, 243 (1988) (citations omitted).

The second element of a procedural due process claim is the deprivation of the property interest. By focusing his argument exclusively on his right in the abstract to a hearing, Trivedi has elided over the fact that he has shown no deprivation of a constitutionally recognized property interest. Trivedi provides no factual support for a claim that his right to continued employment with the state was adversely effected by any action taken by either Oldham or Thayer. He has not shown that the failure to hold a hearing prevented him from continuing in his employment. Indeed, the undisputed record is that the Institute ordered Trivedi to report to work, but he never reported. Thereafter, the Institute kept Trivedi on full pay status. It is uncontroverted that Thayer allowed Trivedi to draw against his accumulated leave credits and continued to issue pay checks when he did not report for work. The undisputed evidence is that Trivedi could have returned to work at any point within the year without penalty, and was so notified on a number of occasions.[3] As a consequence, the defendants did not deprive Trivedi of the essential economic interest at stake in his continued employment.[4] Trivedi has, therefore, failed both to allege and present evidence to suggest any claim that he was deprived of a property interest protected by the Due Process Clause.

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[3] Trivedi asserts in his Local Rule 56.1 Statement that he did not "voluntarily" absent himself from work. This naked assertion can not substitute, however, for evidence of actions taken by the defendants to communicate to Trivedi that he could not return to work. As the uncontested record of communications shows, Thayer advised both Trivedi and Sussman separately in January and February of 1996 that Trivedi was required to report to work.

[4] Trivedi does not challenge through this lawsuit the Institute's termination of his employment in December 1996.

2. Liberty Interest

Trivedi also claims a procedural due process violation based on a deprivation of a liberty interest. Once again, Trivedi has failed to identify the nature of the liberty interest claimed. Trivedi's motion papers, however, do mention the concept of a "name clearing" hearing.

Although not identified by Trivedi, there is a recognized liberty interest "'to engage in any of the common occupations of life.'" *Donato*, 96 F.3d at 630 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). This interest, however, is not affected by every state action with respect to employment; courts have found violations of this interest only in certain employment situations. "Special aggravating circumstances are needed to implicate a liberty interest." *Id.* The liberty interest protects against government actions that "serve as a significant impediment to [plaintiff's] pursuit of her profession." *Jamnsen v. Condo*, 101 F.3d 14, 16 (2d Cir. 1996). Read liberally, Trivedi's complaint may be intended to assert a liberty interest in future employment.

To assert a violation of such a liberty interest successfully, however, more than a "free-standing defamatory statement made by a state official about an employee" is required. *Donato*, 96 F.3d at 630. Instead, the accusations must

> denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession.

Id. at 630-31. Importantly, "[s]tigmatizing statements by the government about an employee upon her discharge only implicate a liberty interest when there is also a public disclosure." *Id.* at 631.

Trivedi has failed to establish a violation of his liberty interest in future employment. The only relevant allegation made by Trivedi in the complaint is that "Thayer broadly circulated this letter [from Rubin] with no reasonable basis in a further effort to embarrass and humiliate the plaintiff." On summary judgment, plaintiff has provided no factual support for the alleged circulation. Moreover, Trivedi offers neither an allegation nor evidence (1) that Rubin's letter, or its substance, was publicly disseminated, or (2) that any dissemination that did occur would be likely to create a roadblock to his future employment. *See Loudermill*, 470 U.S. at 547 n. 13 ("the failure to allege that the reasons for the dismissal were published dooms the claim"); *Donato*, 96 F.3d at 631-32 (publication requirement for discharged employee met if charges are placed in personnel file and are likely to be disclosed to prospective employers). Simply put, Trivedi does not offer any evidence that he was injured by Rubin's determination. Even if some injury is alleged in the complaint, there is no basis to find that Trivedi is able to prove that he actually suffered any injury or that any injury he suffered rises to a constitutional level.

In addition, even if Trivedi had offered evidence of public dissemination, the preliminary nature of Rubin's determination would not support a conclusion that the dissemination created a stigma sufficient to implicate a liberty interest. In *Donato*, the determination at issue was made in connection with a final decision to terminate employment. Here, the determination is preliminary in nature, consists of a two-page letter by an outside psychiatric evaluator, and does not terminate employment. Trivedi's failure to plead or show a constitutionally recognized adverse impact from Rubin's evaluation of his mental health — such as a termination of employment — also precludes a finding that Trivedi has been deprived of a liberty interest.

3. Qualified Immunity

Thayer and Oldham have assumed for purposes of this motion that the plaintiff can establish a deprivation of an established right protected by the Fourteenth Amendment. They contend, however, that they are entitled by law to qualified immunity because the plaintiff had no clearly established right to the process he claims was due — the Section 72 hearing — and because their actions with respect to the scheduling of that hearing were objectively reasonable.

It is well established that

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The question whether law is clearly established turns on an analysis of whether the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . .
>
> Even if the applicable law was clearly established when the purported violation occurred, however, officials may still successfully assert qualified immunity if they can show that their actions were objectively reasonable. That is, officials seeking to establish qualified immunity must undertake to show that reasonable persons in their position would not have understood that their conduct was within the scope of the established prohibition.

Williams v. Greifinger, 97 F.3d 699, 703 (2d Cir. 1996) (internal quotations omitted). Summary judgment may be granted, therefore, "if the court finds that the asserted rights were not clearly established" or if the court concludes, applying the presumptions that pertain to summary judgment motions, that "no rational jury could fail to conclude that it

was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right." *Id.*

Thayer and Oldham admit that the Section 72 hearing was not held within thirty days, and has never been held, but argue that they did not violate Section 72. They contend that Trivedi was not entitled to a Section 72 hearing by January 10 principally for two reasons. First, it would have been impossible and unfair to hold the hearing while Trivedi was in India on an approved vacation that ran until January 12. Second, when they understood that Trivedi had abandoned his job they were no longer obligated to follow the Section 72 procedures to place him on involuntary leave. In effect, Trivedi had no right to a Section 72 *involuntary* leave hearing once he had placed himself on a *voluntary* leave. In the alternative, Thayer and Oldham argue that their actions were objectively reasonable.

The first task is to define the legal right at stake here with the appropriate degree of specificity. *Shechter v. Comptroller*, 79 F.3d 265, 269 (2d Cir. 1996). While it is true that Section 72 grants a right to a hearing within thirty days of the request for a hearing, that general right does not meet the specificity requirements of *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987), when construing a qualified immunity defense. *See Shechter*, 79 F.3d at 271. Instead, the more appropriate questions are whether there was a clearly established right (1) in January 1996, to a Section 72 hearing within 30 days without regard to whether an employee would be able to attend a hearing, and (2) at any time in 1996, to a Section 72 hearing when an individual has stopped coming to work.

Turning to the first issue — the employee's right to a hearing within 30 days whether or not the employee is able to attend such a hearing — the best source of guidance appears to be Section 72 itself. The entire structure of Section 72.1 implies that the hearing shall be held in order to give the employee an opportunity to contest the medical officer's

determination that he is medically unfit to perform his work prior to the termination of employment. Thus, the provision gives the employee the right to receive a copy of the diagnosis, an opportunity to suggest an independent hearing officer, a right to a hearing held on the record and a copy of the hearing transcript, a right to be represented at the hearing by counsel and a reasonable amount of time to obtain such representation, and a right to present evidence. To hold a hearing within 30 days, when the employer knows that the employee is unavailable then but will be available shortly after the thirty day period, might comply with the letter but certainly not the spirit of the law. Indeed, I have little hesitancy in predicting that, had the defendants scheduled a hearing to be held on or before January 10, knowing that Trivedi was out of the country on an approved vacation and unable to attend the hearing, Trivedi would have challenged the hearing decision as a violation of his rights under Section 72.

Turning to the second question, this Court finds no clearly established right in 1996, or since that time, to have the State complete Section 72 proceedings when an employee ceases to attend work when he has been instructed to return. Section 72 is the mechanism that applies when the agency seeks to place an employee on an involuntary leave of absence. Other provisions of law apply to other circumstances. For instance, when an employer seeks to terminate the employment of an employee who has taken a voluntary leave due to a disability, Section 73 applies. When the employer seeks to fire an employee through a disciplinary proceeding, Section 75 applies. *See* N.Y. Civ. Serv. Law § 75 (McKinney 1998). Ultimately, in December 1996, Trivedi's employment with the State was terminated through notice provided pursuant to Section 73. The plaintiff does not contend that the Section 73 procedure ultimately invoked to terminate his employment violated his due process rights, *cf. Hurwitz v. Perales*, 597 N.Y.S.2d 288, 290-91 (N.Y.1993), or that the defendants' resort to a Section 73 procedure is incompatible with having previously invoked a Section 72

procedure, *cf. Thomas v. City of Schenectady*, 557 N.Y.S.2d 511, 512 (App. Div. 1990).

The only remaining question then is whether it was objectively reasonable for Thayer and Oldham to believe that Trivedi had voluntarily absented himself from work, and by doing so, had relieved them of their obligation to schedule a Section 72 hearing.[5] The defendants rely on the following set of facts.

> 1) At no time did they tell Trivedi that he could not come to work. Instead, on December 4, Thayer told Trivedi that it was the Institute's intention to place him on an involuntary leave of absence effective December 29. In that same letter, he was advised of his rights to contest that action and given a copy of Section 72.
>
> 2) During this entire time Trivedi was represented by counsel. Sussman, his counsel, promptly requested a hearing. Section 72 explicitly indicates that such a request holds imposition of any proposed leave in abeyance until a final determination has been made.
>
> 3) During the period December 20 to January 12, Trivedi was on a vacation for which he had received prior approval.
>
> 4) When Trivedi had not returned to work by January 29, Thayer notified Sussman that Trivedi had not been placed on any kind of leave from work; that he had not reported for duty after his scheduled vacation; that Trivedi had failed to meet with his supervisor as

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[5] Trivedi's complaint and motion papers rest on the contention that his constitutional rights were violated when the Section 72 hearing was not held within 30 days of his demand for a hearing. Trivedi does not assert a separate violation from the failure to hold the hearing after the 30 day period had expired. He does argue, however, that the failure to schedule a hearing after 30 days is evidence that the defendants had never intended to give him a hearing.

he had been directed to do; that until his Section 72 appeal is heard Trivedi had a duty to report to work; and that Trivedi's continued absence from work without authorization might subject him to disciplinary action.

5) On February 6, Thayer advised Trivedi in writing that he had been absent from work without authorization since January 16, that employees absent from work without authorization for ten consecutive workdays are deemed to have resigned.

6) Thereafter, Trivedi never reported to work, did not pick up his pay checks, and refused to complete his time sheets.

In response to this and other evidence, Trivedi does not dispute that he failed to return to work when ordered to do so. Instead, the plaintiff urges that, even if he did voluntarily absent himself from work, he nonetheless had a due process right to a Section 72 hearing in order to have his name cleared. As noted above, plaintiff has failed to show that he had an entitlement to a name clearing hearing. In any event, plaintiff's response is insufficient to create an issue of fact as to whether it was objectively reasonable for the defendants to believe that Trivedi was no longer entitled to a Section 72 hearing.

As a last argument, Trivedi argues that as a policy matter it is impractical to postpone a Section 72 hearing since a hearing will need to be conducted in the event an employee on a voluntary disability leave chooses within one year to return to work.[6] There are, of course, countervailing policy

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[6] Under Section 73, a state agency may terminate the employment of an employee who has been continuously absent for a year on a disability leave. The employee must be given an explanation of the grounds for the termination and some opportunity to respond prior to termination, as well as an opportunity for a post-termination hearing to resolve any factual disputes as to the absence. *See Prue v. Hunt*, 575 N.Y.S.2d 806, 808-09 (N.Y.1991); *Economico v. Village of Pelham*, 428 N.Y.S.2d 213, 216

arguments against holding a hearing that may never be necessary. In this case, two psychiatrists had already found Trivedi to be suffering from serious mental health problems[7] and throughout the year 1996 he was actively engaged in litigation with the Institute, claiming employment discrimination by his supervisor and employer. Whatever the merits of the psychiatric evaluations or the lawsuit, the fact of their existence would readily suggest that Trivedi might very well decide to continue his professional life elsewhere and thereby render it unnecessary ever to conduct a hearing. Indeed, the defendants argue that a Section 72 hearing was no longer even appropriate when Trivedi did not to return to work; relying on the structure and purpose of Section 72, they contend that a Section 72 hearing is only appropriate when necessary to place someone on involuntary leave.

The issue for this Court, however, is not whether the plaintiff or the defendants have more forceful policy arguments, but whether the actions of the defendants were objectively reasonable. Viewing the evidence in the light most favorable to Trivedi and drawing all permissible

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(N.Y.1980). In addition, an employee may request a medical examination within one year of the "termination of [the] disability" in order to establish that she is physically and mentally fit to return to work. *See* Section 73.

[7] In addition to Rubin's 1995 determination that Trivedi was mentally unfit to work, Dr. Mark Russakoff attended a counseling session with Trivedi in December 1992. As described in this Court's Opinion and Order in Trivedi I dated December 16, 1996, both doctors testified in Trivedi I that Trivedi suffered from delusional disorder or paranoia. At trial, Trivedi presented no expert testimony to rebut these findings. In addition, evidence was presented in Trivedi I that Trivedi engaged in aberrational behavior that included: (1) taping his mouth shut, wrapping gauze around his head, and refusing to speak at one counselling session, and (2) wadding his ears with cotton, wearing a wool hat, pretending not to hear, and displaying a sign with directions in case of fire at another counselling session. The plaintiff did not deny having so behaved, arguing instead that it was a rational response to his situation. Evidence was also introduced of Trivedi's handwritten writings that suggested he was deeply disturbed. *See Trivedi v. Cooper*, No. 95 Civ.2075, 1996 WL 724743, at *5 (S.D.N.Y. Dec.17, 1996).

inferences in his favor, no rational juror could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate Trivedi's rights when they failed to schedule a Section 72 hearing to place Trivedi on involuntary leave after concluding that the plaintiff had chosen not to return to work despite his employer's demand that he do so.[8]

In summary, Trivedi has failed to offer evidence to support a claim that he has been deprived of either a property interest or a liberty interest protected by the Due Process Clause. Moreover, Trivedi has failed to create an issue of fact that would defeat Thayer and Oldham's reliance on the defense of qualified immunity on Trivedi's procedural due process claims. The claims against Thayer and Oldham are properly dismissed.[9]

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[8] The plaintiff has not argued that Sussman's February 6 letter creates an issue of fact precluding summary judgment, and indeed it would be difficult to do so. In that letter, Sussman indicated that Trivedi was absent from work because he had been placed on an involuntary leave of absence on December 20 through Thayer's December 4 letter. Sussman also asked for written notification that Trivedi was free to return to work.

Sussman's February 6 letter, however, contained an obvious error of law. As is clear from the text of Section 72, his request for a hearing held Trivedi's involuntary leave "in abeyance". Moreover, Thayer had already indicated in writing to both Sussman and Trivedi that not only was Trivedi free to return to work, but that he was required to return to work or risk disciplinary action.

[9] It appears that Trivedi intends to argue that the defendants' conduct was motivated by a desire to retaliate against Trivedi for his filing of Trivedi I. To the extent Trivedi also means to assert retaliation claims in this lawsuit against defendants Thayer and Oldham, this subject is not discussed in the parties' briefs. Although either Title VII, *see* 42 U.S.C. § 2000e-3(a); *Tomka v. Seiter Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995), or the First Amendment, *see Rutan v. Republican Party of Ill.*, 497 U.S. 62, 72-76 (1990), may in appropriate circumstances support claims based on a theory of retaliation, no such claims have been made by the plaintiff in this action. As a result, any inchoate claims by Trivedi based on a theory of retaliation are dismissed.

B. Res Judicata

Cooper, Thayer and Oldham contend that the doctrine of res judicata bars any claims that could have been brought in Trivedi I. Since the claims against Thayer and Oldham have been dismissed for the reasons already described, I consider this motion only insofar as it applies to Cooper.

> Under the doctrine of res judicata, or claim preclusion, once a final judgment has been entered on the merits of a case, that judgment will bar any subsequent litigation by the same parties or those in privity with them concerning "the transaction, or series of connected transactions, out of which the [first] action arose."

SEC v. First Jersey Secs., Inc., 101 F.3d 1450, 1463 (2d Cir. 1996) (quoting *Nevada v. United States*, 463 U.S. 110, 129-30 (1983)). Litigation concerns the same transaction or series of transactions " 'whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first." ' *Id.* at 1464 (quoting *NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983)). This bar on relitigation includes issues that could have been raised in the first action regardless of whether they were actually raised. *Id.* at 1463. Since there is no question that Trivedi and Cooper are parties to both this and the preceding litigation, the only question is whether this litigation concerns the same transactions or series of transactions that were at issue in Trivedi I. It does. As a result of the plaintiff's pleadings and trial strategy, Cooper's role in having Trivedi examined by Rubin was fully explored during the trial in Trivedi I.

In Trivedi I, filed in March 1995, Trivedi sued Cooper and the New York State Office of Mental Health for employment discrimination and retaliation. Trivedi's trial memorandum in Trivedi I, dated March 18, 1996, argued in support of his hostile work environment claim that the defendants' racially-discriminatory treatment of Trivedi continued into 1995 as Trivedi's employer

> initiated proceedings to determine plaintiff's mental fitness to work there. These proceedings were initiated pursuant to section 72 of the Civil Service Law and were utterly baseless as evidenced, in part, by defendants' reliance on plaintiff's behavior three years earlier at two 'counseling' sessions . . . .

In the joint pretrial order dated March 18, 1996, Trivedi indicated that he would call several witnesses to testify about the defendants' efforts "to classify plaintiff under section 72 . . . ."

Prior to trial the Court dismissed the claims against the Office of Mental Health since the Eleventh Amendment bars any claim against a state agency for damages and Trivedi conceded that he was only seeking damages. At a conference on the eve of the trial in Trivedi I, the parties agreed that the trial between Trivedi and Cooper would cover all events concerning the plaintiff that occurred up to December 1995, when he was "suspended" by the Institute. It was undisputed that Cooper had ceased functioning as Trivedi's supervisor in November 1995. As the Court summarized the agreement, the trial would "focus on Mr. Cooper's relationship with Mr. Trivedi up until the time when Mr. Trivedi was suspended."

In his opening statement to the jury, Trivedi made clear that he was relying on Rubin's examination of Trivedi in November 1995 as evidence which supported his claims. "[T]he whole process of sending him to a psychiatrist [Rubin] was bogus and an attempt to cover up for what the agency and Mr. Cooper had done and in retaliation for what he had done." As a consequence of both parties' trial

strategy, the circumstances which led to Rubin's examination of Trivedi in November 1995, were part of the trial record. Trivedi argued that the mental health examination was part of a campaign of harassment. For his part, Cooper argued that Trivedi suffered from a serious mental problem which contributed significantly to his deteriorating performance at work and his delusional thinking regarding Cooper. To support this contention, Cooper called two psychiatrists, one of whom was Rubin. Rubin testified that, based on his examination of Trivedi in November 1995, he had concluded that Trivedi was suffering from a delusional disorder. Finally, Trivedi made Cooper's involvement in the initiation of Rubin's Section 72 examination a prominent feature of his summation argument that Cooper had engaged in retaliatory conduct. *See, e.g., Trivedi v. Cooper*, 95 Civ.2075, Trial Transcript, Oct. 15, 1996, at 1128-30.

The jury was charged on three causes of action: the creation of a hostile work environment on account of Trivedi's race and national origin, in violation of the Equal Protection Clause of the Fourteenth Amendment and Section 1983 of Title 42, United States Code; the denial of a promotion in 1994, in violation of the same laws; and retaliation for Trivedi hiring an attorney, in violation of Section 1981 of Title 42, United States Code. The jury found in favor of Trivedi on all three claims. It awarded him $700,000 in compensatory damages for pain and suffering on the hostile work environment claim, determined that Mr. Trivedi was entitled to back pay on the failure to promote claim, and awarded $1 in nominal damages on the retaliation claim. It declined to impose punitive damages.

On December 16, 1996, the Court ordered that, if the plaintiff didn't accept a remittitur of $650,000 for a final judgment of $50,000, it would order a new trial on liability and damages on the hostile work environment claim. The plaintiff chose the remittitur and judgment was entered on January 3, 1997, awarding the plaintiff $50,000 in damages.

Cooper argues that the doctrine of res judicata bars all claims against him brought in this lawsuit; there can be little dispute but that Cooper is correct. Where, as here, both suits involve "the same parties, similar legal issues, similar facts, or essentially the same type of wrongful conduct," the transaction test is satisfied if "the second cause of action requires the same evidence to support it and is based on facts that were also present in the first." *Maharaj v. BankAmerica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997). The very actions by Cooper of which Trivedi complains in the instant lawsuit fall squarely within the matters tried in Trivedi I. Moreover, to the extent that Cooper's actions are attributed in this lawsuit to a retaliatory motive, that very legal theory—retaliation—was the basis of one of the claims in Trivedi I. Since the claims asserted in this action against Cooper are part of the same series of transactions at issue in Trivedi I, all claims against Cooper are properly dismissed.

C. Personal Involvement

Cooper has also moved to dismiss the three claims in which he is named as a defendant on the ground that he is not personally involved in the incidents which form the basis for the claims brought in this lawsuit. "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (internal quotations omitted).

There are no allegations in the Complaint that Cooper committed any act after October 1995 or that he had any involvement in the decision not to schedule the Section 72 hearing.[10] To the extent that the first two due process claims

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[10] The Complaint contains the following factual allegations against Cooper. Cooper engaged in national origin discrimination against Trivedi in 1995 and Trivedi complained to Cooper about Cooper's discriminatory and retaliatory actions. Cooper retaliated against Trivedi both before and after Trivedi filed the lawsuit which is referred to as Trivedi I. In October 1996, a jury awarded Trivedi $700,000 in compensatory damages against

are based on the failure to conduct the Section 72 hearing, they are properly dismissed as to Cooper on this additional ground as well.

D. Injunctive Relief

The Complaint seeks injunctive relief as well as damages. The injunctive relief which is sought principally includes Trivedi's reinstatement, the return of employment benefits to him, and the circulation of a memorandum to clear his name. In this action, Trivedi has sued the individual defendants solely in their individual capacities. The caption lists the names of the four defendants with the following phrase: "all sued in their individual capacities". The introductory paragraph begins with the following sentence:

> This is an action to redress the deprivation of property and liberty interests without due process of law by the named defendants, all of whom are employees or agents of the New York State Office of Mental Health sued in their individual capacities.

The relief requested, however, is not available from defendants sued in their individual capacities. *See, e.g., Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir.1993). Since Trivedi has sued the defendants in their individual capacities, the request for injunctive relief is properly dismissed.

Cooper arising out of Cooper's discriminatory and retaliatory conduct. Approximately one year earlier, in October 1995, Cooper referred Trivedi for a mental fitness evaluation pursuant to Section 72. In support of this referral, Thayer wrote an October 17, 1995 letter which described Trivedi in an inaccurate manner. Thayer relied on Cooper "for the contents of the letter".

MOTION BY DEFENDANT RUBIN

As noted, Rubin is the psychiatrist who, after evaluating Trivedi in November 1995, found Trivedi mentally unfit for his employment. Rubin has been named in three claims. He is joined with the other three defendants in the claims that Trivedi was deprived of a liberty and a property interest when the Institute failed to schedule a Section 72 hearing. He is the sole defendant in a third claim in the complaint, which alleges that he violated the plaintiff's due process rights by "falsely submitt[ing] a psychiatric report."

In its factual allegations, the complaint asserts that Rubin had "a cursory" meeting with Trivedi and thereafter wrote

> a materially false and misleading report which, without basis concluded that "Mr. Trivedi shows many signs of schizoid, schizotypal and obsessive-compulsive personality disorders but does not meet DMS IV criteria for any of these. The closest acceptable diagnosis would be Delusional disorder, 297.1."

According to the complaint, Rubin admitted during the trial in Trivedi I that a delusional disorder depends on a finding that Trivedi's system of belief was based on falsehoods. Since, the complaint asserts, Rubin had no basis to disbelieve Trivedi's account, he had no basis for concluding that Trivedi suffered from a delusional disorder. The complaint concludes that Rubin drew the conclusion that he did regarding Trivedi's mental state without any substantial basis, maliciously, and because he knew that the Institute wished him to find Trivedi mentally unfit.

Rubin moves for summary judgment on four separate grounds. Rubin argues that the claims in this lawsuit are barred by the Court's ruling in Trivedi I that the trial in that case would cover all events through December 1995. He also argues that Trivedi cannot establish a violation of his rights

under the Due Process Clause since he voluntarily ceased working at the Institute. Rubin further argues that he can only be held liable if his conduct "shocks the conscience", which he argues plaintiff cannot prove. Finally, Rubin invokes the doctrine of qualified immunity.

The first two claims against Rubin, which allege a violation of Trivedi's procedural due process rights based on the failure of the Institute to schedule a Section 72 hearing, are easily dismissed. For reasons already explained, Trivedi does not allege the deprivation of either a property or liberty interest protected by procedural due process. Even if a constitutional interest were at stake, the plaintiff does not contend in either the complaint or in connection with these summary judgment motions that Rubin had a role in scheduling (or failing to schedule) the Section 72 hearing. Whether analyzed in terms of causation, *see Taylor v. Brentwood*, 143 F.3d 679, 686 (2d Cir. 1998), or personal involvement, *see Colon v. Coughlin*, 58 F.3d 865, 863 (2d Cir. 1995), Trivedi must allege that Rubin had some role in depriving him of his procedural due process rights. For all of these reasons, the first two claims in the complaint must be dismissed against Rubin.

The remaining issue, therefore, is whether Rubin may be found to have violated Trivedi's substantive due process rights by rendering a false description of Trivedi's mental state. The elements of a substantive due process claim are (1) the existence of a constitutional right, and (2) state action interfering with that right that is arbitrary in the constitutional sense. *See Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994). An arbitrary action, in the constitutional sense, means more than just an "incorrect or ill-advised" action; it must be "conscience-shocking" or "oppressive in a constitutional sense." *Id.* "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1716 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)). Implicit in a due process claim is the requirement that the defendant's actions were the proximate cause of the

constitutional injury. *See Taylor v. Brentwood Union Free School District*, 143 F.3d 679, 686 (2d Cir. 1998).

A. Property Interest

Trivedi has failed to identify the property interest protected by substantive due process of which he was deprived through Rubin's conduct. Although this Circuit recognized a property interest in continued employment for substantive due process purposes in *Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d. Cir. 1983) (Gargiul I), *vacated* 465 U.S. 1016 (1984), at least where there is a lengthy suspension without pay, the continued validity of that holding has been called into question, *Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities*, 64 F.3d 810, 817 (2d Cir. 1995) (discussing *Gargiul* in context of qualified immunity analysis). *But see Singleton v. Cecil*, 154 F.3d 983, 989-90 (8th Cir. 1998) (substantive due process violated by arbitrary termination of government employment). Even assuming that the right defined in *Gargiul* has survived, Trivedi has neither plead nor proven that he was suspended from his job without pay. As discussed above, in opposing this summary judgment motion, Trivedi was ordered to return to work and refused to do so. The evidence is also undisputed that Trivedi was kept on full pay status. Thayer allowed Trivedi to draw against his accumulated leave credits and continued to issue pay checks when Trivedi did not report for work. Trivedi was notified that the checks were available and was advised to submit time sheets. Trivedi has, therefore, failed to establish that he was deprived of any property interest protected by substantive due process.

B. Liberty Interest

Trivedi has also failed to identify the liberty interest at stake here that is protected by substantive due process. As noted above, in the context of a *procedural* due process claim, there is a liberty interest implicated where the actions of the state create a stigma that interferes with a plaintiff's ability to seek future employment. For the same reasons already discussed in connection with the procedural due process claim, however, Trivedi has failed to offer evidence that he has suffered the harm necessary to find a violation of that liberty interest.

It should be noted though that a defendant's defamation of a plaintiff sufficient to create a stigma—even if it rises to the level necessary to support a procedural due process claim—may not give rise to a substantive due process claim. While procedural due process concerns itself with the fairness of process, substantive due process is based on the fairness of the government action itself, regardless of the procedure used to implement it. *County of Sacramento*, 118 S.Ct. at 1713. As a consequence, the concept of a stigma that implicates a liberty interest and triggers a right to a name-clearing hearing in the context of a procedural due process claim may not be relevant to the substantive due process inquiry. *See Singleton*, 155 F.3d at 989 (finding violation of substantive due process when government employee is fired for actions undertaken by relatives, but observing that "whether the employee . . . . was stigmatized at the time of his dismissal, has nothing to do with" substantive due process). For purposes of the remainder of this analysis, however, the Court will assume that arbitrary and conscience-shocking government action that deprives an individual of government employment may violate the employee's rights to substantive due process.

C. Causation

In order to succeed on a Section 1983 claim, the plaintiff must show that "the defendant caused a deprivation of his or her rights." *Taylor*, 143 F.3d at 686. Causation in a Section 1983 action is narrower than is generally true in tort actions: "'it is perfectly clear that not every injury in which a state official has played some part is actionable . . . .'" *Id.* (quoting *Martinez v. California*, 444 U.S. 277, 2851 (1980)). Liability may not be imposed where "the causal connection between [defendant's] conduct and the constitutional injury is remote rather than direct." *Id.*

Rubin's actions were not the direct cause of any deprivation that Trivedi experienced, or would have experienced had his employment been terminated through the Section 72 process. While it was foreseeable that the examination would be used by the state to make employment decisions with respect to Trivedi, it is undisputed that Rubin had no authority to make any such decision. After the medical examination, the decisions to initiate the involuntary leave procedure or to disseminate the results of Rubin's examination are at the sole discretion of the appointing authority. *See* Section 72.1 ("appointing authority shall notify the employee that he or she may be placed on leave of absence"). Thus, any causal relationship between Rubin's report and a deprivation of Trivedi's rights would be broken by the intervening acts of Trivedi's supervisors to determine (1) whether Trivedi should indeed be placed on involuntary leave, (2) whether the Section 72 procedure should be followed to schedule a hearing for Trivedi to contest Rubin's finding, and (3) whether to continue with the Section 72 hearing and appeal process if Trivedi chose to contest the involuntary leave decision. *Cf. Taylor*, 143 F.3d at 687. Trivedi concedes that Rubin was not responsible for the failure to schedule the Section 72 hearing. Finally to the extent that his claim is based on the stigma rationale discussed above, Trivedi has not alleged that Rubin engaged in any improper dissemination of his findings.

Whether defined as a failure to prove causation or a failure to prove a deprivation of a constitutionally protected interest, Trivedi's claims against Rubin fail for another reason as well. As discussed above, the eventual loss of employment and the decision not to proceed with the Section 72 hearing were — on the basis of undisputed facts — the direct result of Trivedi not returning to work.

D. Conscience Shocking

The final element of a substantive due process claim, the conscience-shocking nature of the conduct, is similarly deficient as a matter of law. The Fourteenth Amendment "does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 118 S.Ct. at 1718 (1998). Instead, the abuse of executive power must shock the conscience to rise to the level of action protected by the Constitution. *Id.* at 1717.

None of the facts, when read in the light most favorable to Trivedi, permit the inference that Rubin engaged in conscience-shocking behavior in his evaluation of Trivedi. Rubin's report, which runs one and one-third pages, indicates that Trivedi was referred by his employer because of its view that his behavior had been "bizarre" and his performance at work had steadily declined. Rubin summarizes Trivedi's own description of his problems with his supervisor, which Trivedi admitted to Rubin no one else had witnessed. Trivedi also explained to Rubin that no other employee had been subjected to the same discriminatory treatment and that it had reached the point that "Mr. Trivedi can think of little else." Rubin described an inch thick stack of memos in which Trivedi describes the abusive treatment. Rubin observed that

> [s]ome of Mr. Trivedi's actions have been eccentric almost to psychosis, such as wadding his ears with cotton so as [to] dramatize [ ] his refusal to hear Mr.

> Cooper's speech. Nonetheless, I am unable to concur with Dr. Russakoff's diagnosis of paranoid schizophrenia.[11]

Rubin then described in some detail Trivedi's behavior during the examination and the information Trivedi gave him on his personal life. He concluded with the following:

> Impression: Mr. Trivedi shows many signs of schizoid, schizotypal and obsessive-compulsive personality disorders but does not meet DMS IV criteria for any of these. The closest acceptable diagnosis would be Delusional disorder, 297.1.
>
> Recommendation: It is clear that Mr. Trivedi's condition renders him unfit for duty.

In his reply to Rubin's Local Rule 56.1 statement, Trivedi makes only the following factual allegations to place Rubin's evaluation in a negative light:

> Denied that Dr. Rubin met with plaintiff for 45 minutes. Plaintiff testified that they met for 10 minutes. Also denied that Dr. Rubin's conclusion that plaintiff suffered a mental disorder was reached in good faith since he cursorily discussed plaintiff's allegations that Cooper had discriminated against him, never asked plaintiff to explain his psychiatric or psychological background or place his workplace behavior in context and he denied that plaintiff suffered from discriminatory conduct even though he lacked any contrary information.[12]

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[11] *See supra* note 7.

[12] Trivedi offered excerpts of the cross-examination of Rubin in Trivedi I and of Trivedi's deposition in the instant action to support his characterization of Rubin's interview.

It is particularly telling that the psychiatric expert Trivedi retained in connection with the current litigation, Dr. Speranza, essentially offers no support for Trivedi's claim against Rubin. Asked to evaluate Trivedi in June 1997 for evidence of current medical illness, Speranza gave the following guarded appraisal of Trivedi's mental health as of that date:

> Given the information currently available, including a 90 minute psychiatric evaluation, there is not enough evidence to make a DSM IV diagnosis of mental illness. *In order to make a diagnosis of Delusional disorder, the presence of a non-bizarre delusion must be established. At this point in time, it is not clear to me that this is the case.* There are no recommendations for treatment at this time.

(Emphasis supplied.) When asked at his deposition whether he had an opinion as to whether Rubin's evaluation was accurate or inaccurate, Speranza responded, "I can't answer that directly. The only thing that I can tell you is that I didn't

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The short and somewhat confusingly excerpted selections from the cross-examination of Rubin contain the following facts: Rubin sent his report to the Department of Civil Service. Rubin admitted that he did not know whether Trivedi's discrimination claims were true, said he had no way of finding out, and still concluded that Trivedi suffered from delusion. Rubin admitted that he did not know the context of Trivedi's wadding of his ears with cotton in a counselling session. *See supra* note 7. Trivedi told Rubin that he was not able to do his work as he would like. When questioned, Trivedi told Rubin he had friends and a relationship. Trivedi told Rubin he had no previous job problems or delusional tendencies. Rubin said he did not know whether the abuses claimed by Trivedi had actually happened.

The similarly excerpted selections from Trivedi's deposition contain the follow facts: Trivedi said the meeting lasted for 10 minutes. Rubin rejected Trivedi's request to tape the interview. Rubin asked Trivedi if a television or God talked to him, whether he had friends, and if so who they were. Trivedi said he was not asked extensively about the memos he wrote to Cooper or Cooper's alleged antisemitic remarks. Trivedi said he was not asked about his psychiatric history.

understand the diagnosis of delusional disorder based on the information in his report." Trivedi provides no other evidence critical of Rubin's performance.

Trivedi does not deny Rubin's factual allegations in support of his motion:

> (1) Rubin is a board certified psychiatrist with experience in rendering these determinations,
>
> (2) Rubin had an independent psychiatric practice and performed only ten or twelve examinations for the Department of Civil Service in any given year,
>
> (2) Rubin had no communication with any of Trivedi's supervisors prior or subsequent to the evaluation,
>
> (4) Rubin promptly prepared a report and forwarded it to the appropriate official, and
>
> (5) following the evaluation and submission of his report, Rubin had no further involvement with the plaintiff and his employment status.

Based on these undisputed facts, this Court concludes that no rational juror could conclude that Rubin's examination and report fell so far below the professional norms for a psychiatric evaluation preparatory to a Section 72 hearing that it shocks the conscience. Rubin was under no obligation to perform an independent investigation of the allegations against Trivedi or of Trivedi's allegations against Cooper. Trivedi's own psychiatric expert does not even contend that Rubin's performance constituted malpractice. Trivedi provides no facts to support an inference that Rubin had any improper motive in performing the examination. At best, Trivedi may be able to show that Rubin's examination of Trivedi was brief and that Rubin rejected Trivedi's description of events based largely on his evaluation of Trivedi's mental state or credibility.

The context in which Rubin's decision was made further supports the conclusion that that decision did not constitute a violation of Trivedi's substantive due process rights. *See County of Sacramento*, 118 S.Ct. at 1718. Unlike the procedural due process case cited by Trivedi, *see Coffan v. Board of Trustees of New York City Pension Fund*, 842 F.Supp. 723, 729 (S.D.N.Y.1994), the evaluation here did not end plaintiff's employment. Instead, as described above, Rubin's evaluation occurred as the first step in a procedure under the New York Civil Service Law which might end in placing an employee on an involuntary leave. In the context of an initial evaluation, Rubin's conduct should not be regarded as conscience shocking, regardless of whether the result would be the same in the context of a final determination.

In summary, Trivedi's procedural due process claims cannot succeed against Rubin because of a failure to assert the deprivation of a liberty or a property interest as well as the failure to allege Rubin's involvement in such a deprivation. Trivedi's substantive due process claims against Rubin fail because there is no showing that Trivedi was deprived of rights protected by substantive due process or that Rubin was the cause of the deprivation. In addition, as a matter of law Rubin's behavior fails to rise to the level of conscience shocking conduct against which substantive due process provides protection.

CONCLUSION

For the reasons given above, the defendants' motions for summary judgment are granted. The Clerk of Court shall enter judgment for the defendants and close the case.

SO ORDERED:

Dated: New York, New York
November 16, 1998

/s/ Denise Cote

DENISE COTE
United States District Judge

NEW YORK CIVIL SERVICE LAW

§ 72. Leave for ordinary disability

1. When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workers' compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of his or her position shall be provided to the employee and the civil service department or commission having jurisdiction prior to the conduct of the medical examination. If, upon such medical examination, such medical officer shall certify that such employee is not physically or mentally fit to perform the duties of his or her position, the appointing authority shall notify such employee that he or she may be placed on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement for the reasons therefor. Such notice shall contain the reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of his or her rights under this procedure. An employee shall be allowed ten working days from service of the notice to object to the imposition of the proposed leave of absence and to request a hearing. The request for such hearing shall be filed by the employee personally or by first class,

certified or registered mail, return receipt requested. Upon receipt of such request, the appointing authority shall supply to the employee, his or her personal physician or authorized representative, copies of all diagnoses, test results, observations and other data supporting the certification, and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority as provided in this section. The appointing authority will afford the employee a hearing within thirty days of the date of a request by the employee to be held by an independent hearing officer agreed to by the appointing authority and the employee except that where the employer is a city of over one million in population such hearing may be held by a hearing officer employed by the office of administrative trials and hearings. If the parties are unable to agree upon a hearing officer, he or she shall be selected by lot from a list of persons maintained by the state department of civil service. The hearing officer shall not be an employee of the same appointing authority as the employee alleged to be disabled. He or she shall be vested with all of the powers of the appointing authority, and shall make a record of the hearing which shall, with his or her recommendation, be referred to the appointing authority for review and decision and which shall be provided to the affected employee free of charge. A copy of the transcript of the hearing shall, upon request of the employee affected, be transmitted to him without charge. The employee may be represented at any hearing by counsel or a representative of a certified or recognized employee organization and may present medical experts and other witnesses or evidence. The employee shall be entitled to a reasonable period of time to obtain such representation. The burden of proving mental or physical unfitness shall be upon the person alleging it. Compliance with technical rules of evidence shall not be required. The appointing

authority will render a final determination within ten working days of the date of receipt of the hearing officer's report and recommendation. The appointing authority may either uphold the original proposed notice of leave of absence, withdraw such notice or modify the notice as appropriate. In any event, a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his or her credit. The appointing authority in the final determination shall notify the employee of his or her right to appeal from such determination to the civil service commission having jurisdiction in accordance with subdivision three of this section.

2. An employee placed on leave pursuant to subdivision one of this section may, within one year after the date commencement of such leave of absence, or thereafter at any time until his or her employment status is terminated, make application to the civil service department or municipal commission having jurisdiction over the position from which such employee is on leave, for a medical examination by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such employee is physically and mentally fit to perform the duties of his or her position, he or she shall be reinstated to his or her position.

3. An employee who is certified as not physically or mentally fit to perform the duties of his or her position and who is placed on leave of absence pursuant to subdivision one of this section, or who is denied reinstatement after examination pursuant to subdivision two of this section, may appeal from such

determination to the state or municipal civil service commission having jurisdiction over his or her position. Such employee and appointing officer or their representatives shall be afforded an opportunity to present facts and arguments in support of their positions including medical evidence at a time and place and in such manner as may be prescribed by the commission. Provided however, that in considering appeals pursuant to subdivision two of this section where a hearing has not been held within nine months from the date of notification pursuant to subdivision one of this section, the commission shall designate an independent hearing officer who shall hold a hearing and report thereon. The commission shall make its determination on the basis of the medical records and such facts and arguments as are presented to it. The final determination of the commission shall be binding on both the employee and the appointing authority; provided, however, that an employee or appointing authority may seek review of a final determination of a commission in accordance with the provisions of article seventy-eight of the civil practice law and rules.

4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave, his or her employment status may be terminated in accordance with the provisions of section seventy-three of this article.

5. Notwithstanding any other provisions of this section, if the appointing authority determines that there is probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations, it may place such employee on involuntary leave of absence immediately; provided, however that the employee shall be entitled

to draw all accumulated unused sick leave, vacation, overtime and other time allowances standing to his or her credit. If such an employee is finally determined not to be physically or mentally unfit to perform the duties of his or her position, he or she shall be restored to his or her position and shall have any leave credits or salary that he or she may have lost because of such involuntary leave of absence restored to him or her less any compensation he or she may have earned in other employment or occupation and any unemployment benefits he or she may have received during such period.

(As amended L.1983, c. 561, § 1; L.1984, c. 547, § 1.)